

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHN THOMAS ENTLER,  
Plaintiff,

v.

BRIDGETTE K. BOLINGER; KERRY  
LAWRENCE,  
Defendant.

No. CV-05-5122-FVS

SUMMARY JUDGMENT ORDER

**THIS MATTER** comes before the Court on the Defendants' Motion For Summary Judgment, Ct. Rec. 30. The Plaintiff is proceeding pro se. The Defendants are represented by Mary C. McLachlan.

The Plaintiff has failed to raise a genuine issue of material fact concerning Mr. Lawrence's motivation for transferring him from the Airway Heights Corrections Center to the Washington State Penitentiary. The Defendants' motion for summary judgment will therefore be granted in part and Lawrence dismissed from this action. However, the evidence submitted by the Plaintiff demonstrates the existence of a triable issue of fact concerning Bolinger's motivation for issuing a minor infraction on September 12 and confiscating his property on December 24, 2003. The Defendants' motion must therefore be denied in part and the matter proceed to trial on the basis of these two incidents.

**BACKGROUND**

This is a Section 1983 action brought by John Thomas Entler, a prisoner in the custody of Washington's Department of Corrections ("DOC"), against a Correctional Officer ("CO"), Bridgette K. Bolinger, and her Correctional Unit Supervisor ("CUS"), Kerry Lawrence. In 2004, the Plaintiff was housed on K-Unit at the Airway Heights Corrections Center ("AHCC"). Declaration of Tiffany Spencer, January 5, 2007 ("Spencer Decl.") Att. A. Lawrence was responsible for managing K-Unit and Bolinger worked there. Declaration of Bridgette Bolinger, January 3, 2007 ("Bolinger Decl.") ¶ 2; Declaration of Kerry Lawrence, January 3, 2007 ("Lawrence Decl.") ¶ 1.

August 9 Infraction

On the morning of August 9, 2004, the Plaintiff assisted another inmate, Willie Davis, in preparing a grievance against Bolinger. Affidavit of John Thomas Entler, March 17, 2005 ("Entler Aff.") ¶ 1; Affidavit of Willie Davis, August 25, 2004 ("Davis Aff."). It is undisputed that Bolinger issued a minor infraction to the Plaintiff later that day.

The parties have submitted conflicting evidence concerning the sequence of events that led up to the issuance of the minor infraction. Bolinger has stated that she issued a general infraction to the Plaintiff on August 9 because he had locked his key in his cell. Bolinger Decl. ¶¶ 4-5, 9. The Plaintiff denies locking his key in his cell. Deposition of John Thomas Entler, December 7, 2006 ("Entler Dep.") at 12. He testifies that, on the afternoon of August 9, Bolinger asked him why he was helping other inmates file grievances

1 and warned him that the staff against whom such grievances were filed  
2 would "take it personally." Entler Aff. ¶ 3. According to the  
3 Plaintiff, Bolinger approached him again on August 14 and urged him to  
4 remember their conversation of August 9. *Id.* ¶ 4. On August 17,  
5 Bolinger served the Plaintiff with a minor infraction. *Id.* ¶ 8.

6 On August 18, the Plaintiff appeared before Sergeant Lucas for a  
7 hearing on the infraction. Lucas found the Plaintiff guilty of the  
8 minor infraction and imposed 20 hours of extra duty as a sanction.  
9 Declaration of Mary C. McLachlan, January 8, 2007 ("McLachlan Decl.")  
10 Att. D. The Plaintiff signed an Extra Duty Sanctions Form, advising  
11 him, "You are also required to complete tasks when requested by Staff.  
12 Failure to do extra duty when directed by Staff will result in Serious  
13 Infraction WAC # 658." Declaration of Toni Wimberly, January 5, 2007  
14 ("Wimberly Decl."), Att. I.

15 September 12 Infraction

16 On September 9, the Plaintiff filed an anti-harassment petition  
17 against Bolinger in Spokane County District Court. Entler Aff. ¶ 11.  
18 The parties agree that Bolinger issued a serious infraction to the  
19 Plaintiff on September 12. Bolinger Decl. ¶ 8; Entler Decl. Att. H.

20 The sequence of events leading up to this infraction is, again,  
21 disputed. Bolinger declares that she ordered the Plaintiff to perform  
22 extra duty on September 12. She issued the infraction because the  
23 Plaintiff refused to comply with this order. Bolinger Decl. ¶ 7. The  
24 Plaintiff declares that Bolinger called him to the officers' station  
25 on September 12 and asked him if he "wanted" to do some extra duty.  
26 The Plaintiff indicated that he would prefer not to do any extra duty

1 at that particular time and Bolinger replied, "OK." Entler Decl. ¶  
2 12.

3 December 5, 2004 "Cell In" Order

4 On December 5, 2004, the Plaintiff and another inmate, Thomas  
5 Asbach, had a conversation outside Asbach's cell just after lunch.  
6 Affidavit of Thomas W. Asbach, January 12, 2005 ("Asbach Aff. 1") at  
7 1. Asbach offered the Plaintiff an apple from his lunch. *Id.*  
8 Bolinger called the Plaintiff and Asbach to the officer's station and  
9 confronted them about passing items between them. Following an  
10 exchange, Bolinger confined both inmates to their cells. Entler Aff.  
11 ¶ 18; Bolinger Decl. ¶ 9.

12 The parties' accounts of this incident differ significantly.  
13 Bolinger declares that she confronted the Plaintiff and Asbach because  
14 she genuinely suspected that they were passing objects between them.  
15 She ordered them to "cell in" after they became rude and  
16 argumentative. Bolinger Decl. ¶ 9. The Plaintiff testifies that  
17 Bolinger accused him of passing illegal contraband without grounds and  
18 directed all of her accusations to the Plaintiff. The Plaintiff  
19 further indicates that both inmates behaved appropriately during the  
20 conversation, and Bolinger confined Asbach to his cell without  
21 directing a word to him. Entler Aff. ¶ 18; Asbach Aff. at 1-2.

22 December 24 Cell Search/Confiscation of Photos

23 On November 16, Risa Klemme, the AHCC official charged with  
24 reviewing confiscated materials, received an album of photos belonging  
25 to the Plaintiff. She was asked to review the contents of the album  
26 for compliance with DOC's obscenity policy. Declaration of Risa

1 Klemme, February 3, 2005 ("Klemme Decl.") ¶ 2,4. Upon review, Klemme  
2 determined that six of the photos did not comply with the policy and  
3 confiscated them. *Id.* at ¶ 5. On November 30, Klemme advised the  
4 Plaintiff by letter that the six photos had been confiscated but the  
5 rest would be returned. *Id.* at 6.

6 On December 6, 2004, the Plaintiff filed a staff conduct  
7 grievance against Bolinger based on the "cell in" incident described  
8 above. Declaration of Devon Schrum ("Schrum Decl."), January 3, 2007,  
9 Att. A. On December 24, Bolinger ordered a search of the Plaintiff's  
10 cell. Lawrence Decl. Att. C; Bolinger Decl. ¶ 11. In the course of  
11 the search, Correctional Officers Tidler and Sprecher found and  
12 confiscated a "photo album w/ cut out photos." Entler Aff. Att. N.

13 The Plaintiff's affidavit implies that the photos confiscated on  
14 December 24 were the same photos Klemme returned to him after her  
15 review. After the album was found, Bolinger became involved. She  
16 read Klemme's letter of November 30, but nevertheless authorized the  
17 confiscation. Entler Aff. ¶ 21.

18 January 20, 2005 Infraction

19 In January of 2005, the Plaintiff filed at least three grievances  
20 against Bolinger based on her alleged failure to perform security  
21 checks. Schrum Decl. Att. B-D.

22 On January 19, 2005, the Plaintiff sent a "kite" to Lawrence,  
23 informing him that he would not perform any extra duty if ordered to  
24 do so by Bolinger, Ward, or Correctional Officer Jackson. Lawrence  
25 responded and informed the Plaintiff that any refusal to complete  
26 extra duty would result in an infraction. Entler Dep. at 63-64. On

1 January 20, 2005, Bolinger ordered the Plaintiff to perform extra  
2 duty. He refused and received an infraction. Wimberly Decl. Att. E.

### 3 Transfer

4 A Facility Plan Change Review was held on February 2, 2005.  
5 Classification Counselors Rita Brazington and Rebecca Isherwood  
6 recommended that the Plaintiff be transferred to a medium security  
7 facility. Wimberly Decl. Att. H. Lawrence concurred with their  
8 recommendations and the Plaintiff was transferred to the Washington  
9 State Penitentiary in Walla Walla.

### 10 Procedural History

11 The Plaintiff instituted the present action on December 29, 2005.  
12 He alleges that the Defendants retaliated against him for exercising  
13 his Constitutional right to free speech. The Defendants moved for  
14 summary judgment on January 8, 2007. The Court requested supplemental  
15 briefing on September 24, 2007. The parties timely completed the  
16 supplemental briefing and the Defendants' motion for summary judgment  
17 now before the Court.

## 18 **DISCUSSION**

### 19 **I. SUBJECT MATTER JURISDICTION**

20 The Plaintiff alleges a federal cause of action arising under 42  
21 U.S.C. § 1983. The Court has jurisdiction to hear this claim pursuant  
22 to 28 U.S.C. § 1331.

### 23 **II. SUMMARY JUDGMENT STANDARD**

24 A moving party is entitled to summary judgment when there are no  
25 genuine issues of material fact in dispute and the moving party is  
26 entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex

1 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed.  
2 2d 265, 273-74 (1986). "A material issue of fact is one that affects  
3 the outcome of the litigation and requires a trial to resolve the  
4 parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*,  
5 677 F.2d 1301, 1306 (9th Cir. 1982).

6 Initially, the party moving for summary judgment bears the burden  
7 of showing that there are no issues of material fact for trial.  
8 *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553, 106 S. Ct. at 274.  
9 Where the moving party does not bear the burden of proof at trial, it  
10 may satisfy this burden by pointing out that there is insufficient  
11 evidence to support the claims of the nonmoving party. *Id.*

12 If the moving party satisfies its burden, the burden then shifts  
13 to the nonmoving party to show that there is an issue of material fact  
14 for trial. Fed. R. Civ. P. 56(e), *Celotex*, 477 U.S. at 324, 106 S.  
15 Ct. at 2553; 91 L. Ed. 2d at 274. There is no issue for trial "unless  
16 there is sufficient evidence favoring the non-moving party for a jury  
17 to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*,  
18 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212  
19 (1986).

### 20 **III. RETALIATION**

21 Although the legal rights of a prisoner are more limited in scope  
22 than those enjoyed by the general population, a prisoner retains those  
23 First Amendment rights that are "not inconsistent with his status as a  
24 prisoner or with the legitimate penological objectives of the  
25 corrections system." *Shaw v. Murphy*, 532 U.S. 223, 229-229, 121 S.  
26 Ct. 1475, 1479, 149 L. Ed. 2d 420, 427 (2001). A prisoner who

1 experiences retaliation for exercising his or her First Amendment  
2 rights may seek recovery under Section 1983 if he or she proves five  
3 elements:

- 4 1) He or she was subjected to adverse action;
- 5 2) The adverse action was imposed because of certain conduct;
- 6 3) The conduct that gave rise to the adverse action is legally  
7 protected;
- 8 4) The adverse action chilled the prisoner's speech; and
- 9 5) The adverse action did not advance a legitimate penological  
10 goal.

*Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005).

11 **A. Motivating Factor**

12 The Defendants argue that the Plaintiff has failed to submit any  
13 evidence that the adverse conduct at issue was motivated by  
14 retaliation. A prisoner may prove that an adverse action was  
15 motivated by retaliation through either direct or circumstantial  
16 evidence. *Hurd v. Garcia*, 454 F. Supp. 2d 1032, 1049 (S.D. Cal.  
17 2006) (citing *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283,  
18 1301 (9th Cir. 1999)). While "timing can properly be considered as  
19 circumstantial evidence of retaliatory intent," timing alone is  
20 insufficient to create a genuine issue of material fact regarding  
21 retaliatory motive. *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir.  
22 1995). An officer's statement that suggests the officer had an  
23 improper motivation may raise a genuine issue of material fact when  
24 combined with suspicious timing. See *Bruce v. Ylst*, 351 F.3d 1283,  
25 1288-89 (9th Cir. 2004) (holding that an officer's statement, "the last  
26 incident where [the plaintiff] acted as spokesperson was the last



1 straw," created a genuine issue of material fact when combined with  
2 the suspicious timing of the action).

3 Each of the incidents on which the Plaintiff seeks to base his  
4 retaliation claim is discussed in turn below.

5 **1. August 9 infraction**

6 The Defendants argue that Bolinger issued the August 9 infraction  
7 because the Defendant had locked his key in his cell, rather than out  
8 of any retaliatory motive. The Plaintiff denies having locked his key  
9 in his cell. He has also submitted evidence that suggests Bolinger  
10 knew that the Plaintiff was helping Davis prepare a grievance against  
11 her, Davis Aff. The Plaintiff has stated that Bolinger warned him  
12 against assisting other inmates with their grievances. Entler Aff. ¶¶  
13 3-4. Bolinger issued the general infraction shortly after she  
14 allegedly issued these warnings. While Bolinger denies these  
15 allegations, it is not for the Court to make credibility  
16 determination. Following *Bruce*, a reasonable jury could conclude from  
17 the evidence presented by Plaintiff that Bolinger's motivation for  
18 issuing the August 9 infraction was retaliatory. The Plaintiff has  
19 thus raised a genuine issue of material fact concerning the August 9  
20 infraction and may rely upon this incident in pursuing his retaliation  
21 claim.

22 **2. September 12 Infraction**

23 The Defendants argue that the Plaintiff received an infraction on  
24 September 12 because he disobeyed Bolinger's order to perform extra  
25 duty. The Court agrees that the Plaintiff has submitted insufficient  
26 evidence to persuade a reasonable jury that Bolinger infringed him for

1 retaliatory reasons. It is true, as the Plaintiff argues, that he  
2 received the September 12 infraction a mere 3 days after filing an  
3 anti-harassment petition against Bolinger. However, timing alone is  
4 insufficient to create a genuine issue of material fact regarding  
5 retaliatory motive. *Pratt*, 65 F.3d at 808.

6 Moreover, any factual issue created by the Plaintiff's testimony  
7 concerning his conversation with Bolinger is immaterial. The  
8 Plaintiff has submitted evidence in the form of his own affidavit that  
9 indicates that Bolinger "asked" the Plaintiff if he "wanted to do some  
10 extra duty," rather than ordering him to do so. *Entler Aff.* ¶ 12.  
11 The Plaintiff further alleges that Bolinger "said ok" when he  
12 indicated that he would prefer not to perform his extra duty. *Id.*  
13 This testimony arguably raises an issue of fact concerning the precise  
14 words that he exchanged with Bolinger on September 12. However, even  
15 if Bolinger did phrase her request as a question, this fact would not  
16 negate the Defendants' argument. It is not uncommon to phrase an  
17 order as a question. The facts demonstrate that the Plaintiff refused  
18 to perform extra duty when asked to do so by an individual whom he is  
19 required to obey. The Plaintiff has failed to raise a genuine issue  
20 of material fact regarding Bolinger's motivation for the September 12  
21 infraction. He thus may not rely upon this incident in pursuing his  
22 retaliation claim.

### 23 **3. December 5 cell-in order**

24 The Defendants argue that Bolinger ordered the Plaintiff and  
25 Asbach to "cell in" in December of 2004 because they had become loud  
26 and disruptive. While the Plaintiff has presented a contrary version

1 of the facts surrounding this incident, he has not responded to the  
2 Defendant's legal argument. In view of this failure, the Court finds  
3 that the Plaintiff has failed to raise a genuine issue of material  
4 fact regarding Bolinger's motivation for the December 5 cell-on order.  
5 He thus may not rely upon this incident in pursuing his retaliation  
6 claim.

7 **4. December 24 Cell Search/Confiscation of Nude Photos**

8 As evidence that Bolinger's seizure of the Plaintiff's photo  
9 album was retaliatory, the Plaintiff relies upon the allegation that  
10 he had previously received permission from Klemme to have the  
11 photographs. Bolinger, he alleges, read Klemme's letter prior to the  
12 search of his cell and the seizure of the photos. The Defendants  
13 argue that Klemme did not authorize the Plaintiff to possess the  
14 photos until four days after the cell search.

15 The Court finds that the Plaintiff has raised a genuine issue of  
16 material fact concerning the motivation for the seizure of the album.  
17 Klemme's declaration indicates that she authorized the Plaintiff to  
18 keep the album in his cell at the end of November, 2004. Klemme Decl.  
19 ¶ 6. The cell search did not occur until December 24, 2004.  
20 Furthermore, the Plaintiff has testified that Bolinger read Klemme's  
21 letter prior to seizing the photos. Entler Aff. ¶ 21. Standing  
22 alone, this alleged fact might not be sufficient to raise a genuine  
23 issue of material fact concerning Bolinger's motivation for the  
24 seizure. However, in the context of the Plaintiff's prior  
25 interactions with and complaints about Bolinger, a reasonable jury  
26 could find the seizure of the photos to be an act of retaliation.

1 Consequently, the Plaintiff may introduce evidence concerning the  
2 seizure of his nude photographs as proof of his retaliation claim.

3 **5. January 20 infraction**

4 The Defendants argues that the motivation for the January 20  
5 infraction was the Plaintiff's refusal to perform extra duty. The  
6 Plaintiff has failed to raise a genuine issue of material fact  
7 concerning the motive behind the January 20 infraction. Although the  
8 Plaintiff is correct that the timing of this infraction is arguably  
9 suspicious, timing alone is insufficient to raise a genuine issue of  
10 material fact. *Pratt*, 65 F.3d at 802.

11 The other fact relied upon by the Plaintiff, the fact that  
12 Bolinger ordered him to perform extra duty with full knowledge that he  
13 would refuse, is no more persuasive. The Defendants have introduced  
14 evidence that, when an inmate is required to perform extra duty as a  
15 sanction, any Correctional Officer may order the inmate to perform the  
16 duty. Declaration of Mike Klemke, October 17, 2007 ("Klemke Decl.") ¶  
17 11. Even assuming that Bolinger was aware of the Plaintiff's  
18 communication to Lawrence, she would presumably also be aware of  
19 Lawrence's response to the Plaintiff. The evidence before the Court  
20 thus indicates that, in ordering the Plaintiff to perform his extra  
21 duty, Bolinger was performing one of her duties as a CO. The  
22 Plaintiff's evidence would not persuade a reasonable jury that  
23 Bolinger acted with a retaliatory motive in issuing the January 20  
24 infraction. The Plaintiff therefore may not rely upon this incident  
25 in pursuing is retaliation claim.

26 **6. Transfer**

1       The Defendants argue that Lawrence's decision to transfer the  
2       Plaintiff was based on his apparently "irresolvable conflict with CO  
3       Bolinger" rather than any retaliatory motive. The Court agrees that  
4       the evidence before it is insufficient to enable a reasonable jury to  
5       find that the Plaintiff's transfer was retaliatory. It is true that  
6       the Plaintiff has introduced evidence that Lawrence threatened to  
7       transfer him if he continued to file grievances against Bolinger.  
8       Entler Aff. ¶ 27; Asbach Aff. at 2. Even assuming, however, that  
9       Lawrence did make this threat, the record shows that the Plaintiff had  
10      received numerous infractions and had filed numerous grievances  
11      against Bolinger. The Plaintiff's other allegations suggest that  
12      relations between himself and Bolinger had become so problematic that  
13      a transfer was the only solution. The Plaintiff's retaliation claim  
14      against Lawrence will therefore be dismissed.

15           **B.     Protected Conduct**

16       A prison regulation that impinges on an inmate's constitutional  
17      rights is valid as long as it is "reasonably related to legitimate  
18      penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct.  
19      2254, 2261, 96 L. Ed. 2d 64, 79 (1987). Communications between  
20      prisoners that contain legal advice or assistance enjoy no greater or  
21      lesser First Amendment protection than other communications between  
22      prisoners. *Shaw*, 532 U.S. at 230, 121 S. Ct. at 1479-80, 149 L. Ed.  
23      2d at 427-428. All free speech challenges brought by prisoners are to  
24      be evaluated under the test articulated in *Turner*. *Id.*

25       Citing *Shaw*, the Defendants argue that prisoners do not have a  
26      First Amendment right to assist each other in filing grievances. The

1 Plaintiff's retaliation claim, however, rests not on an inmate's right  
2 to assist other inmates in filing grievances, but on the right to free  
3 speech and association enjoyed by society at large. *Shaw* did not hold  
4 that prisoners have no Constitutional right to assist each other in  
5 legal matters; it held that interferences with such communications are  
6 subject to analysis under *Turner*.

7 The Defendants further argue that Bolinger did not become aware  
8 that the Plaintiff had assisted Davis with his grievance until after  
9 the filing of the present lawsuit. This argument is contradicted by  
10 the testimony of both the Plaintiff and Davis. The Plaintiff  
11 testifies that Bolinger questioned him about why he was helping other  
12 inmates with their grievances. Davis testifies that Bolinger observed  
13 the Plaintiff assisting him on numerous occasions. The Plaintiff has  
14 thus raised a genuine issue of material fact as to whether Bolinger  
15 knew that he was helping Davis prepare a grievance.

### 16 **C. Chilling Effect**

17 In order to prove that an adverse action had a chilling effect  
18 upon a prisoner, he or she must show that the adverse action "would  
19 chill or silence a person of ordinary firmness from future First  
20 Amendment activities." *Rhodes*, 408 F.3d at 562 (quoting *Mendocino*,  
21 192 F.3d at 1300). As the Ninth Circuit has explained,

22 Because it would be unjust to allow a defendant to escape  
23 liability for a First Amendment violation merely because an  
24 unusually determined plaintiff persists in protected  
activity, a plaintiff does not have to demonstrate that his  
speech was actually inhibited or suppressed.

25 *Id.* at 569 (internal quotation marks and citation omitted).

26 The Defendants argue that the Plaintiff's retaliation claim must

1 fail because he has not demonstrated that his speech was chilled or  
2 that he was otherwise harmed. As the caselaw cited above illustrates,  
3 however, the Plaintiff need not demonstrate that he was deterred from  
4 further acts of speech. The Plaintiff has submitted evidence that, as  
5 a result of Bolinger's allegedly retaliatory conduct, he was required  
6 to perform 20 hours of extra duty and his property was confiscated. A  
7 reasonable jury could find that the consequences would chill or  
8 silence a prisoner of ordinary firmness from speaking in the future.  
9 The Plaintiff has thus raised a genuine issue of material fact as to  
10 whether the conduct at issue chilled his speech.

11 **D. Legitimate Penological Interest**

12 The Plaintiff bears the burden of proving that the allegedly  
13 retaliatory action served no legitimate penological purpose. *Bruce*,  
14 351 F.3d at 1289 (citing *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir.  
15 1995)). Accordingly, when the Government has submitted evidence of a  
16 legitimate penological purpose, the plaintiff must present evidence of  
17 retaliatory motive in order to avoid dismissal or summary judgment.  
18 See *Pratt*, 65 F.3d at 808-10 (holding plaintiff failed to demonstrate  
19 a likelihood of success on the merits where he failed to submit any  
20 evidence contradicting the defendants' evidence of legitimate  
21 correctional purposes); *Davis v. Valdes*, 462 F. Supp. 2d 1084, 1096  
22 (C.D. Cal. 2006) (granting summary judgment where the plaintiff failed  
23 to rebut the defendants' testimony concerning legitimate penological  
24 purpose with any evidence other than his own "bare statements"); *Hurd*  
25 *v. Garcia*, 454 F. Supp. 1032, 1050 (S.D. Cal. 2006) (granting summary  
26 judgment where the plaintiff "fail[ed] to contradict the evidence in

1 the record that Plaintiff was transferred to Facility C to protect him  
2 from inmate assault").

3 The district court should "afford appropriate deference and  
4 flexibility to prison officials in the evaluation of proffered  
5 legitimate penological reasons for conduct alleged to be retaliatory."  
6 *Pratt*, 65 F.3d at 807 (internal quotation marks and citation omitted.)  
7 The Ninth Circuit has long recognized that the preservation of  
8 institutional order and discipline constitutes a legitimate  
9 penological goal. See *Barnett v. Centoni*, 31 F.3d 813 (9th Cir.  
10 1994). However, the Ninth Circuit has also held,

11 prison officials may not defeat a retaliation claim on  
12 summary judgment simply by articulating a general  
13 justification for a neutral process, when there is a genuine  
issue of material fact as to whether the action was taken in  
retaliation for the exercise of a constitutional right.

14 *Bruce*, 351 F.3d at 1289 (citing cases).

15 The Defendants argue that all of Bolinger's actions were  
16 justified by BOP's legitimate interest in preserving discipline and  
17 maintaining safety. The Court agrees that the preservation of  
18 discipline and safety constitutes a legitimate penological interest.  
19 It must now determine whether the evidence submitted by the Plaintiff  
20 creates an issue of material fact as to whether Bolinger "used the  
21 [disciplinary] procedure[s] to silence and punish" him. *Bruce*, 351  
22 F.3d at 1289.

23 Caselaw from the Ninth Circuit concerning a prisoner plaintiff's  
24 burden to disprove the existence of a legitimate penological interest  
25 does not provide a clear answer to this question. The cases that have  
26 dismissed retaliation claims, *Pratt*, *Davis*, and *Hurd*, involved



1 plaintiffs who introduced little or no evidence to refute the  
2 defendants' evidence of a legitimate penological purpose. In  
3 contrast, the plaintiff in *Bruce* submitted evidence that directly  
4 negated the defendants' allegedly legitimate reason for the adverse  
5 action at issue. In *Bruce*, the Institutional Gang Investigator  
6 ("IGI") classified the plaintiff as a member of the Black Guerilla  
7 Family gang. The plaintiff submitted evidence that the IGI's decision  
8 to validate him was based upon the same set of evidence that the IGI  
9 had previously determined was insufficient to support a validation of  
10 gang membership. *Id.* at 1288.

11 The Court concludes that the present case is more analogous to  
12 *Bruce* than to *Pratt*, *Davis*, and *Hurd*. Unlike the plaintiffs in *Pratt*,  
13 *Davis*, and *Hurd*, the Plaintiff has submitted evidence that calls the  
14 legitimate penological purposes of the Defendants into question. Like  
15 the plaintiff in *Bruce*, he has "offered the suspect timing" of the  
16 adverse actions. *Id.* He has also "clearly asserted facts in his  
17 [affidavit] that, if true, show that [the August 9 infraction] was  
18 improperly motivated." *Id.* Specifically, the Plaintiff has presented  
19 evidence that, on August 9, Bolinger warned him that the Correctional  
20 Officers would "take it personally" if he continued to help other  
21 inmates with their grievances. Entler Aff. ¶ 3. He further alleges  
22 that Bolinger later cautioned him to remember this conversation. *Id.*  
23 ¶ 4.

24 Finally, the Plaintiff has introduced evidence that negates the  
25 Defendant's presumed penological objective for confiscating the  
26 Plaintiff's photos. The Plaintiff has introduced evidence that

1 Bolinger confiscated certain photographs from the Plaintiff's cell  
2 after reading a letter that specifically authorized the Plaintiff to  
3 have them. Entler Aff. ¶ 21; Klemme Decl. ¶ 6. The Defendants have  
4 neither argued nor explained why, if the Plaintiff had obtained  
5 permission to possess the photos, confiscation was necessary to  
6 further a legitimate penological objective.

#### 7 **IV. QUALIFIED IMMUNITY**

8 Under the doctrine of qualified immunity, government officials  
9 are immune from civil liability for performing discretionary functions  
10 unless their actions violate "clearly established statutory or  
11 constitutional rights of which a reasonable person would have known."  
12 *Morgan v. Morgensen*, 465 F.3d 1041, 1044 (9th Cir. 2006) (citing *Harlow*  
13 *v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d  
14 396, 410 (1982)). Determining whether an official is entitled to  
15 qualified immunity entails a three step process. First, the Court  
16 must determine whether the facts alleged by the Plaintiff "show the  
17 officer's conduct violated a constitutional right[.]" *Saucier v.*  
18 *Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272,  
19 281 (2001). Second, the Court must determine whether the right in  
20 question was clearly established such that a reasonable officer would  
21 know his or her conduct was unlawful. *Id.* at 202; *Morgan*, 465 F.3d at  
22 1044. Third, the Court must determine "whether a reasonable public  
23 official could have believed that the alleged conduct was lawful."  
24 *Hydrick v. Hunter*, 466 F.3d 676, 690 (9th Cir. 2006).

25 A right is clearly established when "the only reasonable  
26 conclusion from binding authority [is] that the disputed right

1 existed" or the relevant caselaw evinces such a clear trend that  
2 "recognition of the right is only a matter of time." *Hydrick*, 466  
3 F.3d at 690 (internal quotation marks omitted). The Plaintiff bears  
4 the burden of proving that the right was clearly established. *DiRuzza*  
5 *v. County of Tehama*, 206 F.3d 1304, 1313 (9th Cir. 2000).

6 In 2004, it was clearly established that it is unconstitutional  
7 to punish a prisoner in retaliation for the exercise of a  
8 constitutional right. *Rhodes*, 408 F.3d at 567 (citing *Pratt*, 65 F.3d  
9 at 806 n. 4). It was also clearly established that prisoners have a  
10 First Amendment right to file grievances. *Hydrick*, 466 F.3d at 692;  
11 *Hunter v. Heath*, 95 F. Supp. 2d 1140, 1154 (D. Or. 2000) (relying upon  
12 *Bradley v. Hall*, 64 F.3d 1276 (9th Cir. 1995 )).

13 In this case, the Plaintiff alleges that the Defendants  
14 retaliated against him for helping another inmate file a grievance and  
15 for filing grievances of his own. The caselaw cited above  
16 demonstrates that it was clearly established by the late 1990s that it  
17 is unlawful to discipline an inmate in retaliation for filing a  
18 grievance. Under *Rhodes*, it was also clearly established that  
19 retaliating against an inmate for associating or communicating with  
20 other inmates is unlawful. Bolinger is therefore not entitled to  
21 qualified immunity.

## 22 CONCLUSION

23 The Plaintiff has failed to raise a genuine issue of material  
24 fact concerning Bolinger's motivation for issuing the September 12  
25 infraction, the December 5 cell-in order, and the January 20  
26 infraction. The Plaintiff has also failed to submit evidence that

1 would persuade a reasonable jury that Lawrence transferred him for  
2 retaliatory reasons. Lawrence will accordingly be dismissed from this  
3 action.

4 However, the Plaintiff has submitted enough evidence to persuade  
5 a reasonable jury that Bolinger issued the August 9 infraction and  
6 confiscated the photo album in retaliation for the Plaintiff's First  
7 Amendment activities. The First Amendment protects an inmate's right  
8 to speak and associate with other inmates. It also protects an  
9 inmate's right to file grievances.

10 Bolinger is not entitled to qualified immunity because, in 2004,  
11 a reasonable officer would have known that it was unlawful to punish  
12 an inmate for helping another inmate draft a grievance. A reasonable  
13 officer would also have known that it was unlawful to confiscate an  
14 inmate's property in retaliation for the inmate's grievances. This  
15 matter will therefore proceed to trial on the basis of the August 9  
16 infraction and the confiscation of the Plaintiff's photo album.

17 **IT IS HEREBY ORDERED:**

18 1. The Defendants' Motion for Summary Judgment, **Ct. Rec. 30**, is  
19 **GRANTED IN PART** and **DENIED IN PART**.

20 2. Kerry Lawrence is hereby **DISMISSED** from this cause of action.

21 3. The Plaintiff may not rely upon any of the following incidents  
22 in pursuing this litigation:

- 23 a. The infraction issued on September 12, 2004;
- 24 b. The cell-in order issued on December 5, 2004; or
- 25 c. The infraction issued on January 20, 2005.

1           **IT IS SO ORDERED.** The District Court Executive is hereby  
2 directed to enter this order and furnish copies to counsel.

3           **DATED** this 21st day of March, 2008.

4  
5                               s/ Fred Van Sickle  
6                               Fred Van Sickle  
7                               United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26